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REMARKS: <i>Jim Kranfeld staff man in HR 16373 gave me this. E. Ford run down on privacy legislation. Pls. read & file (HR 16373)</i>		
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Justice Report/Protection of citizens' privacy becomes major federal concern

NR 11373

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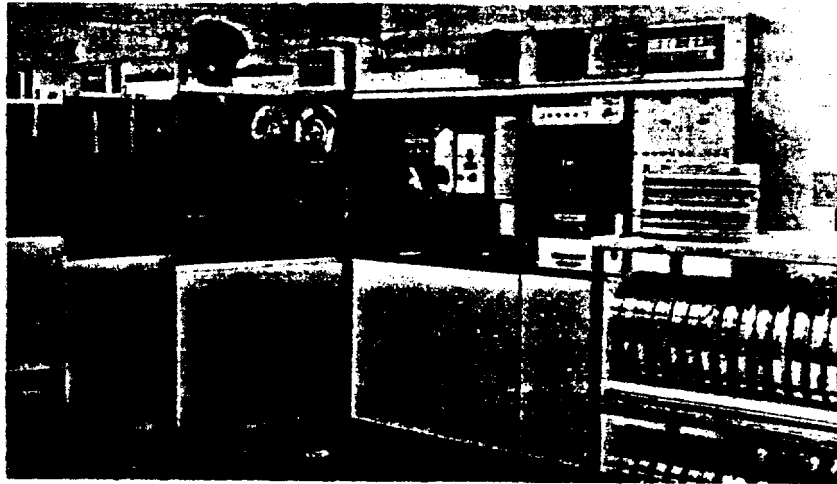
by Richard E. Cohen

A concern that government and business accumulate too much data on private citizens is making the protection of individual privacy an issue high on the priority list of scores of government policy makers.

While part of the rush to action is in response to abuses of government power documented in the Watergate scandals, it also is an inevitable result of the rapid growth of government record keeping made possible by the increasingly sophisticated use of computers. A three-year study by the staff of the Senate Judiciary Constitutional Rights Subcommittee revealed the existence of 858 federal data banks containing 1.246 billion separate records of American citizens.

Under the leadership of a White House committee chaired by Gerald R. Ford when he was Vice President, government agencies have been strongly encouraged to deal with a broad variety of privacy invasions. The issues range from the use of medical and employment records to the implications of a "cashless society."

This review of the government's im-



Presidential task forces are preparing regulations for government data banks

it is designed primarily to serve the White House's political interests rather than to buckle down on agency abuses.

Background: Until about a year ago, privacy was an issue that drew scant public or congressional attention. A few Members of Congress used their committee leadership posts to hold

members of Congress on privacy issues because they are concerned about the 'plumbers unit' and the use of Internal Revenue Service records, and are responding to it," said Rep. William S. Moorhead, D-Pa., chairman of the Foreign Operations and Government Information Subcommittee of the Government Operations Committee.

"There was a crisis for the past few years in communications and data collection. It took awhile for the counterforce to catch up, but Watergate made people more receptive to the issue of what the government is collecting," said Henry Goldberg, general counsel for the White House Office of Telecommunications Policy.

Coincidentally, the Member of Congress with the longest and most active interest in privacy regulation is Sen. Sam J. Ervin Jr., D-N.C., chairman of the Senate Select Committee on Presidential Campaign Activities, which uncovered many of the Watergate abuses. As chairman of the Senate Government Operations Committee and the Judiciary Subcommittee on Constitutional Rights, he has been in a unique legislative position to secure privacy legislation prior to his retirement at the end of 1974.

Ervin's two principal bills are designed to regulate the use of criminal history information and provide rules for the gathering and disclosing of non-criminal information by government agencies. His position as a principal nemesis of the Nixon White House and Justice Department added political complications to the passage of those bills, but his staff has intensified efforts on each of them since the resignation of President Nixon.

A growing consensus is building that too much personal information about private citizens is collected by both business and government and becomes too easily available to people who have no right to it. But while agreement exists that curbs on the collection and dissemination of this data are needed, there is disagreement over how this should be accomplished. A major problem is the reluctance of federal agencies to revise some of the accumulated practices that contribute to the problem. The interest of President Ford in the invasion of privacy issue, however, could speed action.

fact on privacy may bear results similar in scope to those generated five years ago by the concern for protecting the environment. And, as with the ecology boom, privacy may be an issue that is easy to support in general terms but raises complex policy and cost questions when the specifics are analyzed. Action also has been frustrated by bureaucratic inertia in many federal agencies.

One result has been a difficulty in securing agreement on legislation whose goals both congressional and executive branch officials say they support but whose provisions may affect a gamut of unrelated areas.

And some Members of Congress who have been in the forefront of the privacy movement have begun to question the motives of the Administration initiative, wondering whether

hearings on subjects such as wiretapping and other electronic eavesdropping, consumer credit practices, and the use of lie detector tests. Widespread fear about the creation of a "national data bank" arose in the mid-1960s, but faded after the glare of publicity shined on the proposal.

Without any discussion of policy or attempt to set operating standards, the steady growth of federal data banks continued unabated. The only guidelines on federal computer use came from the Office of Management and Budget and the General Services Administration who were interested primarily in procurement practices.

The abuses of individual liberties documented by Watergate have dramatically changed that picture.

"Watergate has made it easier to get the interest and votes of other Mem-

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1522 Ford committee

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Acting to anticipate further danger to civil liberties posed by the pervasiveness of government has proved to be a task easier said than done. A few legislative and administrative steps already have been taken, with increased intensity since the Aug. 9 resignation of Nixon, but many problems will continue to be studied while a growing corps of government privacy experts attempts to set more definite standards for identifying privacy problems and providing solutions.

Until seven months ago, the executive branch lacked an identifiable individual or institutional leader to study privacy issues and coordinate proposed initiatives. Responding to the increasing public interest in privacy, President Nixon Feb. 23 created the Domestic Council Committee on the Right of Privacy and named then Vice President Ford as its chairman.

Geoffrey C. Shepard, associate director of the Domestic Council and the initial coordinator of the privacy committee concept, said following its creation that the committee "will not establish a broad philosophy but will produce a series of recommendations and actions that pursue the theme of restricting the government's demand of information from individuals."

Ford, who demonstrated little interest in the privacy issue during his 25 years in the House, seized the opportunity and appointed his own staff to run the committee. He soon had the committee studying more than a dozen areas and he made several speeches focusing on the need for government action to protect privacy.

In a June 26 speech to the National Broadcast Editorial Association, Vice President Ford said "the problem of insuring personal privacy in a computerized society which threatens to open the most personal affairs of each of us to anyone with access to computer-stored information" is one of the "most serious" and "least realized" problems facing the nation.

In the committee's early months, Ford succeeded in having President Nixon rescind an executive order permitting the Agriculture Department to review the income tax returns of farmers and strongly criticized a General Services Administration (GSA) plan to develop a data network with the capability of linking federal agencies. The GSA plan was subsequently shelved by Administrator Arthur F.



Carole W. Parsons



Douglas W. Metz

Sampson. (For background on the GSA "Fednet" proposal, see Vol. 6, No. 23, p. 856.)

Committee operations: In addition to the Vice President, Nixon appointed six Cabinet members and four sub-Cabinet officials to the committee and asked the committee to give him "a series of direct, enforceable measures" within four months. The committee members included the Secretaries of Treasury, Defense, Commerce, Labor and HEW, the Attorney General, the chairman of the Civil Service Commission, and directors of the Office of Management and Budget, Office of Telecommunications Policy and Office of Consumer Affairs.

The committee held its first meeting at the White House Feb. 26, three days following Nixon's nationwide radio address. According to Shepard, Nixon attended 70 per cent of the two-hour meeting and told the group the government collects too much information that it has no reason to have and cannot use.

Initial activity—Ford appointed Philip W. Buchen, his close friend and former Grand Rapids law partner, as the committee's executive director. It was the first significant government post for Buchen, who Ford named his counsel shortly after he became President.

With the assistance of a staff of three professionals, Buchen supervised the selection of the committee's initial targets. Task forces were established containing representatives of the agencies involved in a specific problem area. The task forces were told to meet as often as possible in

order to develop firm Administration policy in the 14 areas initially identified by the staff and endorsed by the committee.

Although the committee members did not meet again until July 10, and have not met since then, the committee's over-all progress is reviewed once every three or four weeks by a "liaison group" of assistants to the 11 committee members.

According to Carole W. Parsons, a committee staff member, the existence of the committee, its creation of task forces and the elevation of its first chairman to the presidency have caused "agencies all over the executive branch to take notice of the privacy issue and begin to address it." She estimated 200 to 300 persons are directly involved in committee projects.

Douglas W. Metz, deputy executive director of the committee and the principal staff officer since Buchen became counsel to the president, said the committee views its role as providing "leadership in the implementation and coordination of the initiatives which it has endorsed."

One agency official, who is familiar with the work of the committee, said it has been handicapped because its small staff has had to rely heavily on the agencies whose policies are being reviewed. "The big difficulty has been the lack of aggressive leadership from Mr. Ford, who has not had enough time, and Mr. Buchen who has been understandably cautious because he is not an expert on these issues."

OMB role—While the Domestic Council committee developed initiatives and supervised the task forces seeking to find solutions to the prob-

lems, the Office of Management and Budget played a key role in coordinating the increased executive branch activity on a number of privacy issues.

Robert H. Marik, OMB associate director for management and operations, played down the importance of Watergate as an explanation for the accelerated government interest in privacy regulation. He attributed the increased interest to a July 1973 report of the HEW Department's Advisory Committee on Automated Personal Data Systems.

That study, initiated in 1972 by HEW Secretary (1970-73) Elliot L. Richardson, was the first significant departmental review of the implications of government computer technology and it contained a number of recommendations designed to ensure personal privacy. (*For a review of the HEW report, see Vol. 5, No. 43, p. 1602.*)

According to Marik, who was HEW assistant secretary for administration and management before he joined OMB in February 1974, "We saw at HEW that it was not possible for only HEW to set privacy rules because we were only one part of the federal family, so we searched for a central government vehicle to which all federal agencies could relate, but we could not find it."

Nixon's establishment of the Domestic Council committee provided the vehicle for coordinating new policies. OMB's traditional role of serving as a clearinghouse for agency views on proposed legislative and administrative action, Marik said, "placed us in the position of reflecting the attitude that we walk before we run."

"We know some changes must be made in government use of information but the operation of the data systems is a very costly and sophisticated process. To impose on the process significant regulations is a major undertaking."

Walter W. Haase, OMB deputy associate director for information systems and a principal assistant to Marik, has participated actively in the development of many Domestic Council committee initiatives. He said the creation of the committee was an important step in providing an organization with lead responsibility for privacy concerns within the executive branch and a focal point to carry out President Ford's privacy interests.

Republicans Prepare Own Agenda

At the same time that the executive branch was studying initiatives to protect individual privacy, a task force on privacy of the House Republican Research Committee prepared its agenda for legislative action.

Task force Chairman Barry M. Goldwater Jr., R-Calif., said "privacy rights have become subservient to concerns of utility and pragmatism." The task force report was intended to increase public awareness of privacy concerns in the hope that specific reforms will be adopted, he said.

Some of the report's recommendations are similar to the initiatives that are being pursued under the direction of the Domestic Council Committee on the Right of Privacy. The similarities include support for greater protection of the privacy of bank records and consumer credit information, and scaling down of government information requirements.

On several issues, the GOP task force proposed steps that would go considerably beyond proposals now being studied by the White House committee:

- The use of the social security number should be limited to the operation of old-age, survivors, disability insurance and other programs as required by federal law.
- No surveillance or wiretapping of any citizen should be permitted without a court order.
- Tougher steps should be taken to guarantee the confidentiality of Census Bureau information.
- Juvenile court records should be disseminated only to officials directly connected with the child's welfare and rehabilitation.
- No arrest records without a conviction may be used in a federally-supported computerized system.
- A federal "privacy protection agency" should be established to enforce the proposed legislation.

He said OMB complements the committee's efforts in coordinating an Administration position by balancing the privacy concerns with other factors such as budgetary considerations and statutory obligations of the agencies.

New president—At its July 10 meeting the Domestic Council committee formally recommended action in 14 areas. Vice President Ford prepared a report for the President on the committee's proposals. Nixon did not discuss the matter with Ford in the next month and on Aug. 9, Ford found the recommendations still resting on "the president's desk." Since then, the committee has operated on the assumption that the 14 initiatives represent presidential policy.

When Ford announced Aug. 20 his nomination of Nelson A. Rockefeller as Vice President, he said that one of Rockefeller's duties, if confirmed by Congress, would be to serve as chairman of the privacy committee. Rockefeller would be expected to bring his own brand of leadership to the committee and perhaps modify some of its earlier actions.

Douglas Metz, currently the committee's operations director, said he favored a more formal structure for

the committee outside the confines of the Domestic Council. Metz reviews the progress of the committee's work regularly with Geoffrey Shepard of the council and its executive director, Kenneth R. Cole Jr. Metz said the committee also needed more resources and staff capability.

In the interim, the committee staff and task forces have been working actively on the implementation of the 14 initiatives, and have added eight new ones.

Early initiatives: Ford chaired the July 10 privacy committee meeting, which endorsed progress on eight intra-executive branch proposals. Although several of the proposals have been or are likely to be the subject of congressional concern, action on these initiatives is designed to lead only to administrative rather than statutory action.

Privacy impact statements—OMB is directing the preparation of a circular with criteria for agencies to use in developing or acquiring new data systems or capabilities. The objective of the initiative is to ensure that personal privacy rights receive "systematic consideration" in the planning of data systems, including the filing of "privacy impact statements" for public in-

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 spection 30 days before starting the design and procurement of the new system.

Haase said acceptance of the proposal would result in "an evaluation of the privacy implications of proposed systems at each stage of the development process." OMB has set November as a target for adoption of the circular throughout the executive branch.

A draft copy of the circular obtained by *NJR* includes a requirement that each federal agency establish an "office of record for privacy safeguard plans" which will determine whether proposed systems meet the applicable principles for data systems.

Confidentiality standards—The National Bureau of Standards is directing a study to develop standards for the use of sensitive data and will match these to the security safeguards and economics of computer technology. The study is scheduled to be completed in April 1975.

Although several legislative bills already have proposed a comparable set of standards, as have some executive branch proposals, the study is an attempt to bridge the gap between policy makers and the technicians who eventually will be responsible for ensuring the proper enforcement of new laws.

Consumer transactions—The Office of Consumer Affairs, directed by Virginia H. Knauer, has prepared a "fair information user code" for which it is seeking the voluntary endorsement of a cross section of businesses. The standards are designed to set principles for protecting in the marketplace the privacy of personal information.

Subscribers to the code would "pledge to be responsive" to seven principles, including:

- to collect only necessary information;
- to use only legitimate methods to obtain such information;
- to take reasonable steps to assure that the information is reliable;
- to inform the consumer what general uses may be made of the information.

S. John Byington, deputy director of the office, said there would be no enforcement power to the code, but "this does not mean the public or Congress or Federal Trade Commission can't ask a business what it has done to meet the code standards."



Robert H. Marik

He said a draft of the code has been circulated among 15 major companies for their comments, and 10 to 12 of them dealing in retailing, credit reporting, insurance, consumer finance and credit cards have looked at the proposed code in an "agreeable way."

Cable television—The Cabinet Committee on Cable Communications recommended proposals in January 1974 for federal regulation of cable television. The legislation has been under study at the White House since then.

The privacy committee recommended that the Administration proposal include a section prohibiting cable operators from disclosing personally identifiable information about a cable subscriber without his consent or a court order.

Henry Goldberg, general counsel of the Office of Telecommunications Policy, said the draft bill includes comparable language. He added that the only agency holding up final action on the bill by the White House is the Federal Communications Commission, but that he is hopeful a bill can be referred to Congress within a month.

Mailing lists—OMB is directing a study of the use of mailing lists by the federal government. Pending the conclusion of the study, Haase said OMB hopes to issue in the next month an interim policy giving citizens the option of preventing their names from being added to new federal mailing lists.

The Treasury Department recently won its appeal of a case in the U.S. Circuit Court of Appeals for the Dis-

trict of Columbia in which it challenged the right of a manufacturer of winemaking equipment to have access to a Treasury list of all businesses authorized to process 200 gallons of wine each year.

Tax returns—Increased concern about the confidentiality of tax returns, particularly following revelation of White House use of Internal Revenue Service files to attack its "enemies," led the Treasury Department to tighten its rules on records access.

A key step in this process was President Ford's Sept. 20 executive order permitting inspection of IRS records only by the President or his aides upon written request signed by the President. In addition, Treasury prepared legislation setting more formal rules for access to IRS returns by other government agencies.

Sen. Lowell P. Weicker Jr., R-Conn., and Rep. Jerry Litton, D-Mo., authors of legislation (S 3982, HR 16602) to protect the confidentiality of tax returns, said presidential accessibility to tax returns "is better preserved by statute than left to the unpredictable course of an executive order." They also have indicated dissatisfaction with the proposed Treasury Department bill. "The Administration bill is full of loopholes," said Litton.

Public queries—OMB has prepared an executive order for President Ford setting agency procedures to assure citizens the right to discover what information the government is collecting about them. Broader legislation in this area has been approved by the House and Senate Government Operations Committees and should a bill be enacted this year, it would vitiate the initiative.

Electronic funds transfer—The Commerce Department, with assistance from banking agencies including the Federal Reserve Board, Federal Home Loan Bank Board and the Treasury Department and the Office of Telecommunications Policy, is studying the implications of movement in the financial community toward a "cashless society."

In the past, federal policy has encouraged experimentation with electronic funds transfer but there has been no study of the potentially significant impact this would have on privacy as a result of the accumulation of large centralized dossiers of personal financial data.

Legislative initiatives: Six of the privacy committee's original initiatives were in response to bills already introduced in Congress. The committee staff has served both to monitor congressional developments and stimulate federal agencies to prepare proposals responsive to the legislative concerns.

Privacy standards—The legislation that has attracted the most interest in both Congress and the executive branch is a proposal stating general guidelines for agencies on the collection and use of data and providing citizens with a number of rights to ensure the accuracy and confidentiality of the records.

Separate bills (HR 16373, S 3418) have been cleared by the House and Senate Government Operations Committee and floor action is considered likely on each prior to the final adjournment of Congress. Both the privacy committee and OMB staff have met formally and informally with congressional staffers in order to resolve conflicting views. They voice greater approval of the House committee bill, calling S 3418 a "drafting horror" and "over broad."

A staff lawyer on the Senate Government Operations Committee said that the committee has not received satisfactory assistance from the White House in the preparation of its bill. "We invited their participation all the way down the line, but they didn't think we were serious about the bill. As a result, their responses have not been comprehensive or the kind of in-depth analysis we would like to see," he said.

Military surveillance—The Senate Subcommittee on Constitutional Rights has reported to the Judiciary Committee S 2318, a bill prohibiting the armed forces from conducting surveillance of civilians. The privacy committee recommended passage of an "acceptable revision" of the bill.

The Defense Department, which had earlier submitted views in opposition to the bill, was designated as the agency to implement the initiative. A Pentagon attorney said "there has been some change in the position of both sides but no meeting of the minds."

Since the subcommittee held its hearings in 1971 on military surveillance practices, the Defense Department has issued department regulations ending its domestic intelligence operations, but the subcommittee be-



James L. Buckley

lieves permanent legislation is needed to forestall changes in executive policy.

Federal employees—The Civil Service Commission has been designated as the lead agency for preparing legislation to protect the privacy of civilian employees of the executive branch.

The matter has been the subject of legislation sponsored by Sen. Ervin and passed by the Senate on several occasions in the past decade but with no final House action. The bill's provisions have included a ban on the use of polygraph tests for federal employees and prohibition of practices forcing employees to buy bonds or disclose their assets. The most recent Senate action on the proposal was passage of S 1688 on March 7.

In the House, the Post Office and Civil Service Committee has had a comparable bill pending for several weeks. The House draft is weaker than the Senate bill because it would exempt additional agencies and remove the right of counsel.

Donald F. Terry, staff director and counsel for the Subcommittee on Retirement and Employee Benefits of the Post Office and Civil Service Committee said the Civil Service Commission has not softened its opposition to the tougher sections of the Senate bill in spite of the privacy committee's initiative. He said that Anthony L. Mondello, general counsel of the commission, and Douglas Metz of the privacy committee approached him a month ago with a draft bill outlining the Administration's position representing "no real change."

School records—The one legislative initiative that has been enacted is a



Philip W. Buchen

provision calling for the protection of the privacy of school records. The committee announced its support for an amendment to the 1974 elementary and secondary education bill sponsored by Sen. James L. Buckley, CON-N.Y. The provision requires schools and colleges obtaining federal funds to give parents and college students the right to inspect pupils' school records and to limit further disclosure.

As signed into law (88 Stat 484) by President Ford, the so-called Buckley amendment guarantees access to school records by parents and college students, and limits access by third parties that do not have parent or student consent. John D. Kwapisz, legislative assistant to Buckley, said the privacy committee "played no great role but lent moral support" to passage of the amendment. The HEW Department continued its strong opposition to the amendment in spite of the privacy committee's position.

Bank secrecy—The Treasury Department has been assigned the responsibility for drafting legislation to protect the confidentiality of bank transactions. It is not likely that the bill will be completed before the end of this Congress.

Sen. Alan Cranston, D-Calif., has proposed S 2200, which would impose a ban on most practices of financial institutions giving their customer records to federal agencies. The privacy committee announced its support of that "basic concept" but according to a staff member of the Senate Banking, Housing and Urban Affairs Committee, the provision is "violently opposed" by the Internal Revenue Service and FBI.

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Fair credit reporting--Congress enacted in 1970 the Fair Credit Reporting Act (154 Stat 1128) regulating the activities of consumer reporting agencies. Sen. William Proxmire, D-Wis., the principal sponsor of the act, has filed S 2360, which would require additional disclosure of information by credit agencies and right of access by consumers. Following hearings last year, the bill was tabled 4-2 by the Senate Banking Subcommittee on Consumer Credit. However, Proxmire is expected to push for action again when he becomes banking committee chairman next year.

The privacy committee designated the Office of Consumer Affairs to develop an alternative to S 2360. A task force, headed by John Byington, has completed its report and sent it to the committee for further action. Among its recommendations are a modification of the current exemption for medical records.

New initiatives: Since the July 10 meeting, the privacy committee staff and liaisons have studied eight additional initiatives, many of which are still in the planning stages.

Social Security number--Increased use of the social security number as an identifier by both government and private agencies is one of the most controversial and publicly discussed privacy issues.

A task force has been established under the direction of the HEW Department to study possible limitations on its use. Two principal options of the task force are to permit use of the number if the agency has adopted a fair information practices code, and to authorize that an individual be penalized for not giving a number only where the requester has authority to use it.

David B. H. Martin, who was executive director of the earlier HEW advisory committee on privacy, is preparing a policy paper for proposed HEW action. Once the department adopts a position, it will be reviewed with other federal agencies.

Research data--OMB is supervising a study on the means to protect the confidentiality of data collected strictly for research purposes. According to Carole Parsons of the privacy committee staff, the proposal is designed to "insulate sensitive records from compulsory process." One unresolved question, she said, is the extent of research efforts that should be covered.

Health records--An HEW project



Sam J. Ervin Jr.

has been established to review existing departmental practices on the use of health and medical records, including the keeping of records in compliance with statutes dealing with medicare, medicaid, and the cost and quality of medical services.

National security--The Defense Department has initiated a study of the suitability investigations by federal agencies to determine whether individuals are qualified for employment, contracts and access to classified information of a national security character.

Social Security Administration--This study by Social Security officials is reviewing the agency's internal fair information practices on the use of Social Security records, not the use by others of the social security numbers.

Employers records--The Labor Department is supervising a study of personal data by private employers in hiring and promotion decisions. J. Michael Taylor, an attorney in the solicitor's office, said the committee will attempt to "balance the employee's right to be left alone with the employer's need to know if the employee is qualified and honest." Among the practices to be studied are use of arrest records, lie detector tests, insurance records and credit reports.

Information collection--The privacy committee staff is formulating a study of the amount and type of information that is collected by federal agencies. According to Ms. Parsons, "this is one of the most difficult issues to get a handle on, and we're not sure how to proceed."

The subject is of special interest to



William S. Moorhead

small businesses which have complained about excessive federal reporting procedures. The House Oct. 7 approved without dissent HR 16424, a bill to establish a Commission on Federal Paper Work to study similar problems.

Privacy R&D--The committee staff is also considering proposals to encourage research programs on privacy issues by federal agencies, and to designate a federal office to make known the government's interest in the subject to private researchers.

Privacy standards

The most significant action on privacy legislation by Congress this year is likely to be enactment of a bill setting general standards for federal use of citizens' records in its data banks. The legislation has been referred to as a federal "fair information practices code."

The principal features of the bill are likely to be guidelines requiring that, with respect to most federally operated data banks:

- the information not be disseminated to another agency without the written consent of each individual whose record would be transferred;
- the record be accurate, relevant and timely;
- the individual know of the record, have access to it, and be permitted to request a correction when he claims there is a mistake, with an ultimate right of court review;
- civil penalties be available to the individual in case of government violation of the regulations.

Whether the 93rd Congress will enact a privacy bill will essentially be a

question of time. Supporters of the proposal in each chamber attempted to have the House and Senate consider the separate bills prior to the scheduled Oct. 11 start of the election recess. The bills are sufficiently complicated and the differences between them are such that a conference committee will almost assuredly be necessary.

Assuming the congressional leadership adheres to its current plan of a post-election session, there probably would be enough time for the conferees to resolve the differences between the two chambers and send the agreement to President Ford prior to final adjournment. If Congress does not pass a bill, Ford's aides say he will issue an executive order containing many of the proposed actions.

House: The Government Operations Committee Sept. 24 approved without dissent HR 16373, the Privacy Act of 1974. The bill was drafted over a period of several months by the Foreign Operations and Government Information Subcommittee, chaired by Rep. Moorhead, with considerable assistance from the two ranking subcommittee Republicans, Reps. John N. Erlenborn of Illinois and Paul N. McCloskey Jr. of California.

The bill, which has as its principal aim the limitation of the use of personal records by the government, was drafted as an amendment to the Freedom of Information Act of 1966 (80 Stat 383). Ironically, that law is designed to encourage the government to make public more information. Norman G. Cornish, the subcommittee's deputy staff director, explained that the drafting decision was made on the basis that the 1966 law is the only current federal law dealing with information practices.

According to the committee's report accompanying the bill, the legislation "recognizes the legitimate need of the federal government to collect, store, use and share among various agencies certain types of personal data" but provides safeguards to remedy misuse of the information and "reassert the fundamental rights of personal privacy of all Americans."

The keystone to the bill is that, with limited exceptions, a federal agency cannot divulge to another agency personal information about an individual without his consent. Among the exceptions are the activities of law enforcement agencies, the Census Bureau's official surveys, emergency situations

and information needed by Congress for legislative and investigative reasons.

In an interview, Rep. Erlenborn said the bill is important because "technology has progressed to the point where a government agency can push a button and get a mass of information on almost anyone. There should be an assurance that the information is used only for the purpose for which it was collected." He added that while there have been some abuses in the past, passage of the bill is necessary primarily because of "a fear of the future."

Cornish said that "for the first time in the country's history, Americans will have some control over how the federal government utilizes information concerning them and can ensure that the information is used by the government only for the purpose for which it was knowingly submitted."

White House assistance—The drafting of HR 16373 was noteworthy for what all sides acknowledged was a substantial and generally amicable contribution by President Ford's privacy committee and the Office of Management and Budget.

Subcommittee Chairman Moorhead said: "We don't want to interfere with good management of government. The privacy committee staff and OMB were helpful to us and we resolved a number of issues with them." Erlenborn said he had "never seen better cooperation" between OMB and a congressional committee on the drafting of legislation.

OMB Associate Director Marik said there was a "magnificent working relationship" between the subcommittee and the White House, and that the subcommittee was "very responsive" to the points made by OMB. With the exception of one section, he said he supported enactment. Metz of the privacy committee expressed similar views.

Federal employees—The principal outstanding point of contention between the subcommittee and the White House is whether the bill should be applicable to the records of federal employees and whether, for example, they should be entitled to review their employment records.

During the committee debate, Erlenborn said that unless the exemption were adopted, "the bill will wipe out the confidentiality of the civil service system and compromise the commission's testing process." Rep. Dante

B. Fascell, D-Fla., responded that "case after case has shown that you can't get to the root of why an individual employee is not qualified without access to his records." The committee rejected Erlenborn's amendment to add the federal employees exemption by an 11-22 vote.

One controversial section that was struck from the House subcommittee bill would have permitted court awarding of punitive damages against the government in case of a violation of the act. The bill's principal supporters conceded that such a provision would likely provide an unprecedented citizen remedy against the government but argued that it was a necessary "club" against the government.

Senate: The Senate Government Operations Committee Aug. 20 unanimously approved S 3418. Although much of the bill is structured similarly to HR 16373, the drafting process has been considerably more strenuous and has lacked the cooperation with the Administration that marked the House action.

The committee's report is more critical of current government abuses of privacy than is the House committee report. "The lack of self-restraint" by some agencies "has demonstrated the potential throughout government for imposing coercive information burdens on citizens or for invading areas of thought, belief or personal life which should be beyond the reach of the federal data collector," the report said.

The bill, introduced by Chairman Ervin and co-sponsored by Sens. Edmund S. Muskie, D-Maine, and Charles H. Percy, R-Ill., had three days of hearings in June and the one committee markup session in August. In both cases, the House committee gave the bill significantly more lengthy attention.

Criticism—According to several Administration critics of the bill, this quick action reflected the bill's vagueness and inadequate attention to specifics. One White House aide said "there is a genuine commitment among Senators to the bill, but the problem is that the bill needs considerable tightening."

A private attorney who observed the committee's markup session and did not wish to speak for attribution said: "I had a strong feeling that the Senators and staff did not understand the bill and its implications." He said that he sympathized with the staff be-

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Supporters Find Drafting of Criminal Files Proposal . . .

Securing agreement on a bill to regulate the use of FBI criminal history records has consumed thousands of hours of attention from congressional, White House and Justice Department officials and staff. But most participants agree that they are no closer to passage of a meaningful bill than they were a year ago when they began the agonizing effort. They may even be farther apart as a result of the greater understanding of the issues which they have gained.

The drafting process also has been a victim of the Watergate scandal which brought a new Attorney General and Deputy Attorney General who did not feel themselves bound to the earlier Justice Department position on the key issues, consumed the time and attention of the Senator with the most ardent interest in the bill, and made it impossible for the House Judiciary Committee and its staff to consider the proposal during the past six months.

The legislation (S 2963, S 2964, HR 9783) is designed to set the first national rules on the use and dissemination of criminal justice information and impose restrictions on the exchange of criminal records between the Federal Bureau of Investigation (FBI) and thousands of police departments across the country. Interest in the bill was aroused by the absence of specific laws on the subject, leading many critics to cite a serious threat to personal privacy. (*For background on the controversy and details of the proposals, see Vol. 5, No. 43, p. 1599, and Vol. 6, No. 7, p. 246.*)

Negotiations: The effort to move ahead on the legislation has been marked by a continual series of meetings between congressional and Justice Department staff, attempts to put on paper what tentatively was agreed to orally, and renegotiations of supposedly final provisions.

"When the crunch comes, the Justice Department is not making decisions, and the White House is not there to push it along. Either the Administration's concern for privacy is a 'paper tiger' or there is a calculated effort to stymie action. In either case, there would be the same result of Congress's inability to act," said Lawrence M. Baskir, chief counsel and staff director of the Senate Judiciary Subcommittee on Constitutional Rights, chaired by Sen. Sam J. Ervin Jr., D-N.C. (Baskir plans to resign soon and become general counsel of the Presidential Clemency Board.)

Deputy Attorney General Laurence H. Silberman, who has headed the Justice Department's review of the bill since his March confirmation by the Senate, disagreed with Baskir. "We have been working hard for the past month to reach an Administration position. With President Ford's accession to the presidency, the issue became of greater importance, and it became possible to get an administration position. That was difficult under President Nixon because an attempt was tried earlier and it failed."

Silberman was referring to the drafting last fall of the original Justice Department bill (S 2964) under the direction of Associate Deputy Attorney General (1973-74) Martin B. Danziger. The bill was sent to Congress

as a "Justice Department bill" because of the inability to resolve opposition of several agencies, including the Civil Service Commission and Defense and Treasury Departments. Silberman said that the recent review of the bill has resulted in a change in the Justice Department's position in S 2964.

Staff meetings—The first extended discussions on the bill between congressional and Justice Department staff were 60 to 80 hours of meetings in May and June between Mark H. Gitenstein, counsel of the Senate subcommittee, and Mary C. Lawton, deputy assistant attorney general (Office of Legal Counsel).

They redrafted Ervin's bill, S 2963, in order to make it more amenable to the Justice Department. However, when Ms. Lawton forwarded the proposed compromise to others at Justice, she found "parts of the department were not happy with the result." In an interview, Silberman said she was only giving the congressional aides "technical help" without indicating the Administration's position.

Several weeks later, a delegation of officials from the FBI, led by John B. Hotis, an FBI attorney who serves as its liaison for legislative issues, went to the Senate subcommittee staff with suggested changes on many of the issues that had been earlier discussed. "We were upset, as was Sen. Ervin," said Gitenstein.

Silberman meetings—In an Aug. 15 letter to Silberman, Sens. Ervin and Roman L. Hruska, ranking Republican on the Judiciary Committee, said the problems with S 2963 "are not insurmountable" and added "it is incumbent upon the Department to come forward with proposals for changes in this markup." They suggested a task force be created to develop a compromise bill by the first week of September.

Three or four meetings were subsequently held in Silberman's office including representatives of the Senate and House Judiciary Committees, Justice Department, FBI and Douglas W. Metz, deputy executive director of the Domestic Council Committee on the Right of Privacy.

At the same time, Silberman chaired a series of meetings with representatives of federal agencies that opposed the bill. According to informed sources, some of the most vigorous opposition to the bill came from within the Justice Department, including Assistant Attorney General Henry E. Petersen of the Criminal Division.

Following those meetings, Silberman directed Lawton and Hotis to draft a bill reflecting the consensus of views exchanged at the working sessions. They finished that process Sept. 27 and their draft bill was circulated to several Justice Department officials. In the following two weeks, additional department and executive branch meetings were held to review the revised proposal.

Senate bill: At the same time that Justice Department and congressional negotiators were trying to find common ground on the many controversial issues in the legislation, staff members of the Senate Constitutional Rights Subcommittee met regularly to draft a bill ac-

... a Path Filled with Bottlenecks and Complex Issues



Laurence H. Silberman



Roman L. Hruska

ceptable to the subcommittee members.

Gitenstein and J. C. Argetsinger, subcommittee minority counsel, held a series of meetings resulting in a memorandum listing proposed changes, which was sent to Sens. Ervin and Hruska. The differences between Ervin and Hruska are reportedly narrower than those between Ervin and the Justice Department. As a result, there has been tentative staff agreement on a number of amendments to S 2963, the original Ervin bill, and the Senators are expected to meet and develop new plans for Senate passage this year.

Arrest records—A central issue has been whether police should be permitted to disseminate criminal records which show an arrest but no conviction. S 2963 would have permitted this practice only in limited circumstances or if the arrest had been pending less than one year. The latest draft of the bill permits use of arrest records if the local law enforcement agency adopts federal minimum standards. One standard permits use of arrest records or criminal histories not resulting in a conviction if the facts of the case "warrant the conclusion that the individual has committed or is about to commit a crime and that the information may be relevant to that act." The test is taken from the 1968 Supreme Court opinion in *Terry v. Ohio* permitting police to "stop and frisk" on the basis of "reasonable suspicion."

Dissemination—The original Ervin bill generally permitted non-criminal justice agencies to receive only conviction records. Under the revised bill, they may receive arrest records less than one year old if there has been an indictment and the charges are still actively pending. A report prepared at Ervin's request by the General Accounting Office showed that only 7 per cent of the requests to the FBI for criminal records are made by police prior to an arrest. Ervin said the report "confirms my suspicions" that FBI records are used primarily for licensing and employment in state and local government.

Gitenstein of the Senate subcommittee staff said the report shows the FBI runs the criminal records system but it is used primarily for non-police purposes, demonstrating the need for civilian, court, and prosecutorial agencies to be a part of the system's management. However, an FBI official said "I don't think most peo-

ple are upset with the way we handle our records."

Enforcement—S 2963 proposed a federal-state administrative system to enforce the bill, while the Justice Department strongly believes the FBI should continue to run the criminal records files. The subject reportedly is one of those causing the most debate. Silberman said the issue is "one of the most complicated subjects I have ever seen in legislation." Ervin has stressed that enforcement should reflect the "federal" nature of criminal records by ensuring the states a role in determining policy on their use. The most recent draft of his bill prohibits a federal agency from control of any records other than an index of the criminal files five years after the bill's enactment.

Sealing—The provision in S 2963 requiring that all records be "sealed" seven years after their original entry to prohibit their further use has been changed to permit the use of an index of the sealed records. The sealed files could be used by police officials where an individual is subsequently charged with a more serious offense or as the result of a court order.

Intelligence files—Another controversial issue is dissemination of intelligence and investigative information, which includes confidential reports compiled by police officers. The revised Ervin bill has relaxed its previous proposal by permitting the exchange of such information among law enforcement agencies where a "need to know" or "right to know" has been demonstrated by the requestor, or if "rational inferences . . . warrant the conclusion that the individual has committed or is about to commit a criminal act and that the information may be relevant to that act."

House: While the House Judiciary Subcommittee on Civil Rights and Constitutional Rights held hearings on the subject last winter, its members and staff have been so preoccupied with the impeachment inquiry and the confirmation of Nelson A. Rockefeller as vice president that they have not had sufficient time to participate actively in efforts to reach a compromise.

Subcommittee Counsel Alan A. Parker said Chairman Don Edwards, D-Calif., still supports a less complicated bill such as HR 188, which he introduced, setting restrictions on use of arrest records.

Rep. Charles E. Wiggins, R-Calif., ranking Republican on the subcommittee, said privacy legislation is a "priority" item for the subcommittee but predicted there would not be time to act before the next Congress convenes. Wiggins has stressed that the bill should not endanger the policeman on the street by depriving him of needed information.

Outlook: Although there is practically no chance that congressional, Justice Department, and administration officials will be able to reach a final agreement this year on legislation to set standards for the use of criminal history records, their efforts this year have made more likely enactment of a proposal by the 94th Congress. Many of the participants in the drafting process privately voiced frustration with the pace of their toils but continued hope for long-term success.

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cause of the "enormously complex problems" and suggested that legislation may not now be the answer to the privacy concern.

Lawrence M. Baskir, chief counsel and staff director of Ervin's Constitutional Rights Subcommittee, who participated in the drafting of the bill, disagreed that S 3418 was more unusual or complex than other legislation approved by Congress. "All of the proposals in the bill have been discussed since at least 1970. Our staff is very familiar with them and has been working on privacy longer than anyone in the executive branch," he said.

He was particularly critical of what he called "last minute quibbling suggestions" from the White House. "The executive branch is good in suggesting changes but it still has not prepared its final position even though the bill has been pending for several months," he said Sept. 25.

A 35-page memo commenting on the bill was sent Sept. 16 to the Government Operations Committee staff by Metz. Two days later, the committee received a seven-page listing of "major concerns" from OMB Director Roy L. Ash.

Commission—A principal point of dispute in S 3418 is its proposal to establish a Privacy Protection Commission as an independent agency. Its purpose would be two-fold—to adopt guidelines to assist government agencies in implementing the act, and study federal data bank practices and recommend necessary changes to Congress and the President.

James Davidson, counsel to Muskie's intergovernmental relations subcommittee, said the commission is necessary because of both the need for a central point of expertise in implementing privacy rules and the fact that there has never been a full-fledged study of privacy problems in both the public and private sectors.

The White House response to the Senate committee is that the commission would be "another layer of bureaucracy" that would slow the initiation of the new regulations and might also be "a handy excuse for delaying the implementation of some important privacy safeguards."

White House: In the event that the House and Senate do not reach agreement on a federal privacy standards bill before the 93rd Congress finishes its work, President Ford will issue an executive order modeled on the



John N. Erlenborn

standards of the pending legislation.

Metz said the executive order would be "nearly identical" to the House committee bill. "We are committed to action—either executive or legislative—to show the good faith of the Administration to act."

Metz said there was no White House preference for an executive order instead of legislation and that Ford and his aides will continue to push for a bill until it is clear that there is "no opportunity for legislative action in this Congress."

Baskir, Ervin's chief aide on privacy legislation, criticized the White House for having an executive order ready to be issued in lieu of the legislation. He said this and the "last-minute criticisms" of S 3418 led him and others in Congress to believe "the Administration position on privacy is to cooperate but still obstruct progress in order to prevent the bill from being passed."

The result, he said, would be that the Democratic Congress would pass no privacy legislation and the President could issue his own executive order and "steal the thunder."

Baskir's contention was denied by OMB's Marik who said Ford's intentions are "genuine."

Assessment

A review of privacy developments during the first nine months of 1974 demonstrates the involvement of a substantial number of executive and congressional officials in the struggle to develop regulations to deal with the real and potential threats to individual liberties posed by the growth of computer technology.

President Ford has several times since he became President referred to his abiding interest in the privacy issue and he gives every indication that he intends to keep the issue alive. Nelson Rockefeller may give new direction to the White House privacy committee but it is probably too late to move it in the direction of less activity rather than more.

Key questions remain, however, as to the extent to which the White House can and will attempt to budge the often recalcitrant agencies from their traditional positions of adhering to "tried and true" bureaucratic practices.

There is also the question as to the extent Ford is willing to share the privacy limelight with Congress.

Rep. Litton of Missouri, a principal supporter of greater confidentiality of tax returns, said Ford and Buchen were extremely interested in his proposal during the summer. This changed after Ford became President, Litton said.

"The more they looked at the issues, the more they realized it wasn't so easy as they thought, and the pressure from the agencies got to them," he said.

Norman Cornish of the House Government Operations Committee staff emphasized that OMB and the White House were cooperative with his committee in trying to work out legislative problems.

But he said "the Administration inclination to turn to executive orders is a bad omen" of a possible lack of full cooperation between the President and Congress.

Whichever way the initiatives and working relationships turn, officials at both ends of Pennsylvania Avenue agree that privacy will remain a live issue in the post-Watergate climate and that bureaucrats in every part of the government will have to adjust their practices on the handling of citizen records.

They also indicate that the results of the federal privacy regulation program will help dictate future regulation of privately operated data banks. OMB associate director Marik said "the privacy concerns on federal data systems are certainly applicable in the private sector," but added that the federal government should first "put its own house in order and determine the impact of the regulations so that the private sector is not impaired by costly or cumbersome proposals." □